82615-3

No. 28375-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNAH SIMPSON, and TRACY WOLCOT, individually and on behalf of all other nonmembers similarly situated,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF WASHINGTON EDUCATION ASSOCIATION

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I. INTRODUCTION

On May 13, 2008, this Court requested that the parties submit supplemental briefing addressing two issues:

1. Do the undisputed facts support a claim for restitution?

2. Does Nelson v. Appleway, 160 Wn.2d 173, 157 P.3d 847 (2007), apply here?

As we show, the answer to both questions is "No."

II. PROCEDURAL HISTORY

This case began seven (7) years ago, in March 2001, when a class action lawsuit was filed against WEA on behalf of present or former public school employees, alleging a private right of action under Chapter 42.17 RCW, and several tort claims: conversion, breach of fiduciary duty, and fraudulent concealment. Davenport plaintiffs sought recovery of a portion of the agency fees that they paid from the period from 1995-1999. WEA filed a CR 12(c) motion to dismiss, alleging, *inter alia:* (1) that there is no private right of action under the PDA; (2) that there can be no conversion because agency fees by statute belong to the union; and (3) that the plaintiffs' tort claims arose out of the collective bargaining relationship

and were thus subsumed by the duty of fair representation ("DFR").[1] As a consequence, the applicable statute of limitations was six (6) months – the statute of limitations applicable to DFR claims.

On November 2, 2001, the trial court denied WEA's motion to dismiss,[2] ruling that there is an implied private right of action under Chapter 42.17 RCW, that the other claims were not subsumed by the duty of fair representation, and that the statute of limitations was three years.[3] (CP 82-95). The court also certified the case as a class action[4] and signed a Consolidated Order on Pending Motions on which this interlocutory appeal is based. (CP 172-6). WEA filed a timely motion for discretionary review which this Court granted. Trial court proceedings were stayed pending disposition of this appeal. Because the appeal was interlocutory, there is no factual record at the trial court level and no findings of fact by the court.

In 2003, considering an enforcement action brought against the WEA by the Public Disclosure Commission, this court held RCW 42.17.760 to be unconstitutional. ***State ex rel. PDC v. WEA***, 117 Wn.

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[1] *See:* ***Allen v. Seattle Police Guild***, 100 Wn.2d 361, 670 P.2d 246 (1983); ***Schmidtke v. Tacoma School Dist.***, 69 Wn.App. 174, 848 P.2d 203 (Div. II, 1993).

[2] The trial court did dismiss the Third Cause of Action regarding breach of fiduciary duty.

[3] After ruling that the appropriate statute of limitations was three (3) years, on December 7, 2001, the trial court ruled that it was a five (5) year statute of limitations (CP 82, 160-164, R.P. 12/7/01, pp. 9-11).

[4] The trial court granted class action status to the implied private right of action and conversion claims, but not to the fraudulent concealment claim.

App. 625, 71 P.3d 244 (2003). The PDC appealed. ***Davenport*** was then consolidated with the PDC case to determine the constitutionality of RCW 42.17.760. The Washington Supreme Court determined that RCW 42.17.760 was unconstitutional. That court did not reach either Davenport's claim that chapter 42.17 RCW implies a private right of action or any of Davenport's tort claims. ***State ex rel. P.D.C. v. W.E.A***, 156 Wn.2d 543; 130 P.3d 352 (2006). The PDC and Davenport appealed and the U.S. Supreme Court reversed, remanding the cases to the Washington Supreme Court. ***Davenport, et al., v. Washington Education Association; Washington v. Washington Education Association***, ___U.S. ___, 127 S. Ct. 2372; 168 L. Ed. 2d 71 (2007).

No court has ever made findings of fact in ***Davenport***.

III. STATEMENT OF FACTS

This case came before this court on an interlocutory appeal from a trial court ruling on WEA's Motion to Dismiss. There have been no findings of fact in this case. The only "undisputed facts" are those which are asserted in Plaintiffs' complaint and admitted in the Defendant's Answer. CP 33-37. Therein, WEA admitted that it and its affiliates are parties to contractual agreements containing agency shop provisions as authorized by law and that nonmembers are charged an agency fee thereunder. WEA also admitted that on behalf of the PDC, pursuant to

RCW 42.17.400, the Attorney General commenced an enforcement action in Thurston County Superior Court.

WEA denied that it used agency fees to influence elections and to support political committees without authorization. CP 35. WEA disputed that Plaintiffs are appropriate class representatives, and raised as an affirmative defense that the action is barred in whole or in part by the court-approved settlement in ***Leer, et al. v. Washington Education Association***, No. C96-1612Z. WEA further raised as affirmative defenses that Plaintiffs had waived their right to bring this action and that the doctrine of equitable estoppel precludes them from bringing the action.

There has not been a finding on whether the ***Davenport*** plaintiffs filed a complaint pursuant to RCW 42.17.400(4) with the PDC or provided notices to the appropriate governmental authorities. WEA has contended throughout these proceedings that the ***Davenport*** plaintiffs lack standing to bring this action because they failed to file such a complaint.

Many of the facts found by the trial court in ***PDC v. WEA*** have been challenged on appeal. In particular, WEA challenged the trial court's finding that WEA violated RCW 42.17.760 by using the fees collected from fee payers for purposes articulated in the statute. Unchallenged findings of fact are verities on appeal. ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The converse is also true. Challenged facts are not

verities and should not be considered as such by this court. Thus, without any factual record supporting Plaintiffs' claims, any disposition by this Court upholding Plaintiffs' claims on the merits or otherwise providing relief to plaintiffs would be premature.

IV. ARGUMENT

A. THE UNDISPUTED FACTS DO NOT SUPPORT A CLAIM FOR RESTITUTION

The *Restatement (Third) of Restitution* explains that:

> " '[a] person who is unjustly enriched at the expense of another is liable in restitution to the other.' " ... (quoting **Restatement (Third) of Restitution and Unjust Enrichment** § 1 (Discussion Draft, Mar. 31, 2000)).

Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560, 576, 161 P.3d 473 (2007). Claims for restitution are thus founded on the equitable principle of unjust enrichment. A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity. ***Farwest Steel Corp. v. Mainline Metal Works, Inc.***, 48 Wn. App. 719, 731-32, 741 P.2d 58 (1987).

However, the fact of enrichment alone does not trigger the doctrine of unjust enrichment. *See*: ***Dragt***, *supra* at 576, wherein the court stated:

> In order for a court to apply the doctrine, the enrichment must be unjust under the circumstances and as between the two parties to the transaction. ... Three elements must be established for unjust enrichment: (1) there must be a benefit conferred on one party by another, (2) the party

> receiving the benefit must have an appreciation or knowledge of the benefit, and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value. (Citations omitted).

Davenport cannot meet these three elements. WEA collected agency shop fees that it was legally entitled to collect pursuant to statute and pursuant to relevant collective bargaining agreements. Under the agency shop provisions, the union is entitled to collect a fee equivalent to 100 percent of union dues from nonmembers in the bargaining unit. RCW 41.59.100. The purpose of statutory provision is to prevent nonmembers from receiving services for which they have not paid – a so-called "free-rider" provision. Guaranteeing that nonmembers pay no more than the value of the services, the U.S. Supreme Court devised the ***Hudson***[5] process, by which nonmembers may contest the service fee and receive a rebate. Each nonmember is told of the ***Hudson*** process on an annual basis.[6]

WEA has not retained fees under circumstances that make it inequitable for it to retain those fees. Rather, restitution is barred by the "voluntary payment" doctrine, recognized by Washington courts as a

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[5] *See generally*: *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

[6] Davenport's Amended Complaint acknowledges the annual Hudson Notice sent by WEA to fee payers. CP 64. Davenport alleged that WEA made misrepresentations in its notice, an allegation WEA denied. CP 35-6, 64.

"well-settled general rule."[7] ***Maxwell v. Provident Mutual Ins. Co.,*** 180 Wash. 560, 567, 41 P.2d 147 (1950). The voluntary payment doctrine is a complete defense to a claim for breach of contract or unjust enrichment. ***Riensche v. Cingular Wireless, LLC.***, ____F.Supp. ___, 2007 U.S. Dist. LEXIS 83921 (W.D. Wa 2007). The voluntary payment doctrine requires a person who disputes the appropriateness of an assessed charge to assert a challenge either before or contemporaneously with making a payment. *Id.* Although the fees in question here are assessed by statute rather than a service contract, that difference is not dispositive.

The doctrine has two purposes: 1) "it permits entities receiving payment for services to rely upon the funds and 'use them unfettered in future activities';" and 2) it "discourages litigation because, after being notified of a dispute by the payor, the payee presumably will take steps to rectify the situation and avoid suit." ***Riensche***, *supra at* 16-17. In unjust enrichment cases, the courts place upon the payor the obligation to contemporaneously dispute the charge. ***Id.***

In discussing the rationale for the voluntary payment doctrine, the

[7] The term "voluntary" is used loosely by the courts. Most cases involve payment of monthly bills for services pursuant to a contract. When the person to whom the bill is sent pays it without dispute, that act is deemed "voluntary." So too, here, where the payment for service is automatically deducted from the pay of the nonmember, when he or she does not then follow the ***Hudson*** process, the payment should be deemed "voluntary."

Riensche court, additionally cited *supra* at 17:

> *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship, 2002 WI 108, 255 Wis. 2d 447, 460, 649 N.W.2d 626, 636 (2002)* ("All that a payor has to do to sidestep the voluntary payment doctrine is to make some form of protest . . . . When a payee has been given that notice, the funds received can be secured . . . until the dispute is settled."); *see Hawkinson, supra, 53 Wn.2d at 459, 334 P.2d at 544* ("To allow a person who has made payment of a disputed debt later to seek restitution from the creditor, would be to permit him, by postponing suit, to choose his own time and place for litigation and to change his position from that of a defendant to that of a plaintiff, which would be unfair to the other party." (quoting *RESTATEMENT OF RESTITUTION ß 71 cmt. b* (1937))). (some citations omitted).

Here, the ***Davenport*** plaintiffs made no attempt to use the established ***Hudson*** procedures for disputing the agency fee payments to WEA. Rather, they pursued litigation without permitting WEA to follow the established steps of providing a nearly contemporaneous rebate and thus avoid this litigation. Consequently, the voluntary payment doctrine constitutes a complete affirmative defense to their claim for restitution based upon unjust enrichment.

The fee payers were notified of the right to request a refund and they failed to do so. Pursuant to applicable laws, WEA notified fee payers that they had the authority to object to payment of the fees and have returned to them a portion of the fee deemed the "nonchargeable" amount. There is no dispute that the nonchargeable amount is larger than the

amount the ***Davenport*** plaintiffs contend that they are owed as "expenditures to influence an election or operate a political committee." ***Davenport*** plaintiffs did not file an objection and thus, did not receive a rebate of the nonchargeable amount. In so doing, these fee payers effectively waived any right they might otherwise have to restitution.

The ***Hudson*** notice process followed by the WEA acts as a complete defense to a claim of unjust enrichment, if one had been made. The ***Davenport*** plaintiffs neither disputed the amounts paid contemporaneous with the payment nor did any of them file simple objections after receiving notice of their individual right to do so. Rather, these individuals sat on their right to object to their payment of fees. And, they failed to move to intervene in a pending lawsuit concerning these funds. Consequently, the voluntary payment doctrine constitutes a complete affirmative defense to any claim for restitution based upon unjust enrichment. ***Hawkinson v. Conniff***, 53 Wn.2d 454, 459, 334 P.2d 540 (1959).

Moreover, due to the uncertainty of the law at the time, WEA should be found to have been unjustly enriched by retaining the disputed fees. When WEA received the funds, there had been no interpretation of the meaning or validity of RCW 42.17.760. Since then, courts have obviously differed as to its constitutionality. ***State ex rel. P.D.C. v.***

W.E.A, 156 Wn.2d 543; 130 P.3d 352 (2006) *reversed by* ***Davenport, et al., v. Washington Education Association; Washington v. Washington Education Association***, ___U.S. ___, 127 S. Ct. 2372; 168 L. Ed. 2d 71 (2007). And, there has been no finding by any appellate court that WEA has used the funds in violation of the statute. WEA has denied doing so, stating in its Answer that it had sufficient membership dues to cover such expenditures. CP 35, ¶ 22. And even if there were such a finding in the enforcement action brought by the PDC, that finding would have no *res judicata* effect in ***Davenport***.

Under the doctrine of *res judicata*, a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with the subsequent action in: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. ***Rains v. State***, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

There is no identity in causes of action between the PDC enforcement action and the subsequent ***Davenport*** action. ***PDC v. WEA*** was an enforcement action brought to enforce election laws by what is effectively a law enforcement agency in the campaign finance arena. The plaintiffs in the ***Davenport*** case have brought a mixture of individual tort claims against the WEA which are independent and distinct from the

enforcement action. In the enforcement action, the trial court made a finding that WEA violated the statute and issued a fine. That finding and the corresponding penalty are still under appeal. The trial court made no finding with regard to the amount of funds that may have been spent in violation of RCW 42.17.760 because such a finding was not material to the enforcement action. However, that determination would be essential to a tort claim.

Neither is there an identity in the persons or parties bringing the action between the two cases. The Public Disclosure Commission in bringing the enforcement action had the full powers and authority of an enforcer. The ***Davenport*** plaintiffs did not bring a *qui tam* action pursuant to RCW 42.17.400 and consequently are not standing in the shoes of the State. Thus, any findings in the PDC action, even if those findings were final and verities on appeal, which they are not, have absolutely no *res judicata* effect in the ***Davenport*** case.

B. ***NELSON v. APPLEWAY*** DOES NOT APPLY HERE.

In ***Nelson,*** a case brought under the Consumer Protection Act, the plaintiff purchased a used car from the Appleway dealership. ***Nelson v. Appleway***, 160 Wn.2d 173, 175 P.3d 847 (2007). After negotiating the final price, Appleway added a B&O tax. *Id.* The plaintiff paid the B&O tax under protest, and filed a class action soon thereafter. *Id.* at 178 & n.3,

157 P.3d at 849 & n.3. The Washington Supreme Court held that RCW 82.04.500 bars a business from tacking a B&O surcharge onto the purchase price. ("Appleway can disclose or itemize costs associated with the purchased item, but unlike a sales tax, it cannot add a B&O tax to the purchase price.")

Davenport is clearly distinguishable from ***Nelson***. Significantly, in ***Nelson***, *supra*, the plaintiff brought an independent claim of restitution. Consequently, the court did not address whether there was an implied private right of action under the statute at issue therein, RCW 82.04.500. Here, the ***Davenport*** plaintiffs did not bring an independent claim for restitution. See Amended Complaint. CP 59-68.

Second and perhaps more significantly, ***Nelson*** was not followed by ***Riensche v. Cingular Wireless LLC***, discussed *supra* at pp. 7-8. Like ***Nelson***, ***Riensche*** was brought under the Consumer Protection Act. However, in ***Nelson***, the payor disputed the amount of the surcharge for the B&O tax contemporaneous with the payment. In contrast, Riensche never contemporaneously protested the surcharge, never took steps to investigate whether it was properly assessed, and apparently never even tried to make himself aware that it was being included in his bills. Thus, the District Court determined that Riensche's payment of the B&O surcharge was voluntary and with full knowledge. *Id.* at 22.

Finally, in ***Nelson***, *supra*, the plaintiffs had no legal right to collect the B&O tax. In contrast, WEA collected agency fees that it had a legal right to collect. This difference is significant, especially as a matter of equity.

There is no unchallenged finding that WEA violated RCW 42.17.760 in its use of the fees. Even if a court, after appellate review, found that WEA had violated RCW 42.17.760, which it has not, it is one thing for WEA to be ordered to pay a fine for the election law violation in an enforcement action. It would be quite another and grossly unfair to order WEA to pay restitution to fee payers when they sat on their right to a rebate offered contemporaneous with the payment of their fees.

C. ***DAVENPORT*** PLAINTIFFS SHOULD BE ESTOPPED FROM SEEKING RESTITUTION.

In its Answer, WEA raised the affirmative defense of equitable estoppel. The ***Davenport*** plaintiffs should be equitably estopped from making a claim for unjust enrichment. The elements of estoppel are:

> (1) an admission, statement, or act inconsistent with the claim afterwards asserted,
>
> (2) action by the other party on the faith of such admission, statement, or act, and
>
> (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Budget Rent A Car v. Licensing, 144 Wn.2d 889, 31 P.3d 1174 (2001).

By failing timely to object to the WEA's retention of agency fees, ***Davenport*** plaintiffs took an action inconsistent with its premise in this lawsuit: that WEA somehow concealed that it was making political expenditures from its general treasury or otherwise misappropriated fees that it did not have the legal right to. Simply put, ***Davenport*** plaintiffs first failed to object, and subsequently made this claim, which is clearly inconsistent with their failure to object.

Second, WEA retained the fees on the faith that its agency fee payers did not object.

Finally, any order of restitution would constitute an injury to WEA. Such injury results from allowing the ***Davenport*** plaintiffs to contradict their earlier failure to timely object to WEA's retention of the full amount of the agency fee. Thus, the ***Davenport*** plaintiffs should be estopped from receiving an award of restitution.

D. PLAINTIFFS WAIVED ANY RIGHT TO A REBATE.

WEA also raised as an affirmative defense that the plaintiffs' actions are barred due to waiver. By failing to make any timely objection to the payment of nonchargeable amounts, the ***Davenport*** plaintiffs have waived any right to restitution or any other remedy. "A waiver is the

intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive." ***Jones v. Best***, 134 Wn.2d 232; 950 P.2d 1 (1998).

In order for a court to determine that one has intentionally waived a right, there must exist unequivocal acts or conduct evidencing an intent to waive. ***Id.*** The party claiming waiver has the burden to prove that the other party had the intention to relinquish the right. ***Id.***

The undisputed facts show that ***Davenport*** plaintiffs received ***Hudson*** notices, and were given the opportunity to object to payment of nonchargeable amounts, but failed to take action. Whether this failure to take action constitutes waiver is a mixed question of fact and law. However, given the procedural history of this case,[8] WEA has not had the opportunity to inquire of ***Davenport*** plaintiffs whether the failure to file an objection in the course of the ***Hudson*** process was knowing and intentional. And, no court has made any finding to this effect. WEA should at least be given the opportunity to make such inquiry in the course of regular discovery prior to any award of restitution or any other remedy.

[8] *See* pp. 1 – 3.

E. THE STATUTE OF LIMITATIONS FOR A RESTITUTION CLAIM IS THREE YEARS.

The three (3) year statute of limitations applicable to actions on unwritten contracts applies to an action for unjust enrichment. ***Eckert v. Skagit Corp.***, 20 Wn. App. 849, 850, 583 P.2d 1239 (1978). If restitution is ordered, this Court should limit its order the relevant three year period.

CONCLUSION

For the foregoing reasons, WEA respectfully requests that this Court determine that restitution does not apply to the undisputed facts of this case and dismiss the case for reasons stated in its previous briefing.

Dated this 26th day of June, 2008.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNAH SIMPSON, and TRACY WOLCOT, Respondents, v. WASHINGTON EDUCATION ASSOCIATION, Appellant.	NO. 28375-1--II CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of June, 2008, I caused to be served a true and correct copy of WEA's Supplemental Brief and this document by method indicated below and addressed to the following:

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DATED this 26th of June, 2008.

Judith Lonnquist